No. 88- (2)

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

RICHARD D. SHAPERO - - - - Petitioner

versus

KENTUCKY BAR ASSOCIATION - - Respondent

On Petition for a Writ of Certiorari to the
Supreme Court of Kentucky

RESPONDENT'S BRIEF IN OPPOSITION

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Due Date:
May 19, 1989

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37pp

QUESTIONS PRESENTED

1. Did the Supreme Court of Kentucky correctly rule that attorneys' fees and expenses were not properly recoverable under 42 U.S.C. §1988 in this proceeding for judicial review of an administrative ruling as to the ethics of a lawyer using a targeted direct letter of solicitation of employment in violation of a rule of the Supreme Court of Kentucky, Petitioner Shapero now having pending an action in the United States District Court for the Western District of Kentucky under 42 U.S.C. §1983 in which he specifically seeks recovery of such fees and expenses?

2. Did the Supreme Court of Kentucky correctly rule that there was no letter before the Court to remand to the Advertising Commission for consideration, Petitioner Shapero having abandoned his right to appeal the ruling of the Advertising Commission disapproving his proposed letter of solicitation and having chosen instead to seek an ethics ruling in a separate proceeding?

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No. 88-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

RICHARD D. SHAPERO - - - - *Petitioner*

v.

KENTUCKY BAR ASSOCIATION - - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Kentucky Bar Association, respectfully requests that this Court deny Petitioner Shapero's Petition for Certiorari seeking review of (1) the Opinion and Order of the Supreme Court of Kentucky entered January 19, 1989 and reported at 763 S. W. 2d 126 (Ky. 1989), reproduced in the Appendix to the Petition for Certiorari and referred to by Petitioner Shapero as "*Shapero II*", and (2) the Order of said Court entered April 6, 1989 and ordered by the Court to be published but which has not yet been published, also reproduced in the Appendix to the Petition and referred to by Petitioner Shapero as "*Shapero III*".

STATEMENT OF THE CASE

Respondent, Kentucky Bar Association (herein sometimes called "KBA"), does not accept the statement of the case given by Petitioner Shapero (herein sometimes called "Shapero") but sets forth its own statement below.

Petitioner Shapero attacked the Kentucky Supreme Court's prohibition against targeted direct mail solicitation of employment by lawyers by initiating *three* separate proceedings concerning the same subject matter. One of these proceedings is an action in the United States District Court for the Western District of Kentucky under 42 U.S.C. §1983 for violation of his civil rights. A copy of Petitioner's Amended Complaint in that action is reproduced in the Appendix to this Brief at pp. 1a-8a. In that action, Shapero seeks to recover attorneys' fees under 42 U.S.C. §1988. The important point which we wish to make at the outset is that the proceeding now before this Court is *not* a §1983 action. We describe below the three divergent paths which Shapero has followed in his attack upon the Supreme Court of Kentucky's rule against targeted direct mail solicitation of employment for pecuniary gain.

The first proceeding Shapero initiated was an application to the Kentucky Attorneys Advertising Commission dated July 12, 1985, for approval of a letter of solicitation which he proposed to send to persons against whom foreclosure proceedings had been instituted. The Advertising Commission, in a decision

dated September 19, 1988, found that the proposed letter was in violation of Kentucky Supreme Court Rule (hereinafter "S.C.R.") 3.135(5). The Commission said the proposed letter "is not approved". See the Commission's opinion, included in the Appendix to this Brief at pp. 9a-13a. Under S.C.R. 3.135(8), Shapero had the right to appeal the Advertising Commission's ruling to the Board of Governors of the KBA. If Petitioner felt aggrieved by the ruling of the Board of Governors, the same rule gave him the right to seek further review by the Supreme Court of Kentucky. However, Petitioner did not exercise these rights of appeal; instead, he *abandoned* this proceeding.[1]

Rather than appealing the ruling of the Advertising Commission, Petitioner started off on his second path, and requested an Advisory Opinion from the Committee on Legal Ethics as to the propriety of his proposed letter of solicitation—the same letter which the Advertising Commission had already disapproved. S.C.R. 3.530 provides that the Ethics Committee may furnish a written informal opinion or may request the Board of Governors of the KBA to pass upon the question. The Board may then issue a formal opinion, in which three-fourths of the members of the Board must concur. In the case at bar, the Board of Governors issued Advisory Opinion E-310 in 1986. A copy of

[1]This is not the first time this case has been before this Court. A more detailed discussion of the history of this litigation may be found in the Respondent's Brief filed in the previous Supreme Court action between the parties, *Shapero* v. *Kentucky Bar Association*, No. 87-16.

that Opinion is reproduced in the Appendix to this Brief at pp. 14a-15a. Opinion E-310 addressed not only Shapero's inquiry about his proposed targeted direct letter of solicitation concerning foreclosures, but also the issue of the use of targeted direct mail advertising to potential tort plaintiffs. In other words, the opinion was broader than the issue raised by Shapero.

On April 29, 1986, Shapero sought review of Opinion E-310 in the Supreme Court of Kentucky. Review was granted, the questions were fully briefed, and oral argument was heard. On November 26, 1986, the Supreme Court of Kentucky handed down its opinion affirming Advisory Opinion E-310 of the Board of Governors. A copy of the Supreme Court of Kentucky's Opinion, referred to by Petitioner as "Shapero I", is included in Petitioner's Appendix to his Petition, and is also reported in 726 S. W. 2d 299. Petitioner thereafter filed his Petition for Certiorari in this Court in No. 87-16.

It is important to note that in seeking the advisory ruling and in appealing that ruling to the Supreme Court of Kentucky, Petitioner Shapero *did not* seek permission to send his proposed letter, for the very good reason that the Ethics Committee had no jurisdiction to grant or deny such permission. Such jurisdiction lay in the Advertising Commission, and Petitioner Shapero had already received its adverse ruling and had abandoned that proceeding.

On May 21, 1987, Petitioner Shapero set out upon his third path when he served an amended complaint[2] in an action filed in the United States District Court for the Western District of Kentucky at Louisville, Civil Action No. 83-0129-L(B). Appendix pp. 1a-8a. In that amended complaint, relying upon 42 U.S.C. §1983, Petitioner alleged that S.C.R. 3.135 (the advertising rule) violated his constitutional rights. Petitioner sought injunctive relief against the rule and its enforcement; a declaration that the adoption and implementation of the rule violated his constitutional rights; damages; and reasonable attorneys' fees. That action is still pending. In July, 1988, Shapero renewed his motion for preliminary injunction and for partial summary judgment.

In the meantime, on June 13, 1988, this Court handed down its Opinion in No. 87-16, reversing the Supreme Court of Kentucky and remanding the case for further proceedings. *Shapero* v. *Kentucky Bar Association*, 486 U.S. —, 100 L. Ed. 2d 475, 108 S. Ct. 1916 (1988). Subsequently, various pleadings were filed by both parties in the Kentucky Supreme Court. On October 4, 1988, Petitioner Shapero filed a motion for attorneys' fees of $60,025.00 and expenses of $9,186.35. The Respondent opposed the motion by its response served October 27, 1988, and Shapero replied on November 22, 1988. The Supreme Court of Kentucky, by its Opinion and Order entered January 19,

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[2]Petitioner filed his original Federal District Court Complaint in 1983.

1989, denied the motion. Petitioner Shapero refers to this Opinion and Order as "*Shapero II*"; it is reproduced in his Appendix to the Petition for Certiorari. It is this ruling which is the subject of the current Petition for Certiorari.

On February 16, 1989, Petitioner Shapero served in the Supreme Court of Kentucky a "motion for final judgment", asserting that there was still before the Court the question of the appropriate disposition of the opinion of the Supreme Court of Kentucky in *Shapero I*, "and the question of the propriety of the advertisement submitted by Richard Shapero". Respondent KBA filed its response on February 24, 1989, arguing that the mandate of this Court, having been filed in the Supreme Court of Kentucky, was self-executing and that the American Bar Association Model Rule of Professional Conduct 7.3 was no longer in effect *to the extent that* this Court found it to be inappropriate. Respondent KBA further argued that Shapero's proposed letter of solicitation was not before the Court and could not be remanded to the Advertising Commission, because Shapero did not appeal from the ruling of the Advertising Commission refusing to approve the letter. Respondent argued that Shapero must submit his letter to the Advertising Commission anew and that if this is done Shapero might find the ruling of the Commission to be satisfactory; hence, that it would be improvident for the Supreme Court of Kentucky to make a ruling about the Shapero solicitation letter because, if proper pro-

cedure is followed and the matter is presented to the Advertising Commission, the letter may be approved and the question may never be presented to the Supreme Court of Kentucky.

On April 6, 1989, the Supreme Court of Kentucky entered an Order denying Shapero's motion for final judgment. Petitioner refers to this Order as "*Shapero III*" and it is reproduced in the Appendix to his Petition for Certiorari.

REASONS FOR DENYING THE WRIT

1. The First Question Presented By Petitioner Shapero Is A Sham; The Supreme Court of Kentucky Did Not Amend Findings Which Were The Basis For Its Decision Which Was Reversed By The Supreme Court Of The United States.

Petitioner Shapero claims that the Kentucky Supreme Court amended the findings upon which this Court relied in *Shapero* v. *Kentucky Bar Association*, 486 U.S. ___, and then used those amended findings to deny Petitioner's request for attorneys' fees. Petitioner's entire argument under his first question is based upon the last sentence of the Supreme Court of Kentucky in *Shapero I:* "We affirm the decision of the Ethics Committee to deny the request." 726 S. W. 2d at 301. In its opinion and order entered in *Shapero II*, the Supreme Court of Kentucky stated that its opinion in *Shapero I* "erroneously stated that we affirmed the decision of the Ethics Committee in denying the request". 763 S. W. 2d 126, 128 (1989). The Court went on to explain that in *Shapero I* it

affirmed the opinion of the Ethics Committee that targeted direct mailings violate the Kentucky ethical rules, but that "neither the Committee nor this Court denied any request [to mail a particular letter]". *Id.* The Court explained:

> The Ethics Committee never reviewed Mr. Shapero's request for permission to send the letter. The Ethics Committee had no authority to grant or deny permission to send the proposed letter. Jurisdiction lay in the Advertising Commission. Petitioner received the ruling of the Advertising Commission, but chose not to appeal the ruling. . . . The wording of our Opinion in the *Shapero* case was in error in assuming there was a "request" before us to deny, but this mistake does not create a right where none exists.

Id.

The Supreme Court of Kentucky simply misspoke itself in the last sentence of its opinion in *Shapero I*. That error in language, however, did not alter the issue before the Court or its ruling. It is not uncommon for appellate courts, with the heavy burdens they carry, to misspeak themselves in their opinions about non-essential or peripheral matters, but such errors do not affect or invalidate the essential rulings of the courts. For example, this Court misspoke itself no fewer than three times in its majority opinion of June 13, 1988 in this case: first on page four of the Slip Opinion in referring to the Respondent when the Petitioner was meant, second on page seven in misstating a comparison made in Respondent's Brief, and third

on page twelve in misquoting an extract from its opinion in the *R.M.J.* case. None of these errors affected this Court's essential ruling that a State may not categorically prohibit lawyers from soliciting business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems. In the same way, the erroneous reference to a "request" in the last sentence of the opinion in *Shapero I* in no way affected the Kentucky Court's essential ruling, which was to affirm the Advisory Opinion of the Ethics Committee.

Grasping the inadvertent use of the word "request", Shapero claims that he "believed that the Supreme Court of Kentucky had denied his request to mail the letter in issue". (Petition, p. 8). Shapero is bound to know that this statement is not true, for he knows that his request for approval of the letter was addressed by him to the Advertising Commission and when that Commission ruled against him, he did not appeal its ruling. The issue before the Supreme Court of Kentucky was not whether to grant or deny permission to Shapero to send the letter. The issue was whether as a matter of ethics an attorney (any attorney, not Shapero alone) could send a letter of solicitation to potential tort plaintiffs, victims of foreclosure and others. See generally, Advisory Opinion E-310, Appendix pp. 14a-15a.

Shapero's reliance (Petition, pp. 11-14) upon authorities dealing with the supremacy of this Court over inferior courts is an empty exercise since no one, least

of all the Respondent KBA, questions that doctrine. The ruling of the Supreme Court of Kentucky in *Shapero II* turned not on the "request" issue, but upon the fact that Shapero "did not seek anything more than an opinion from us overruling an ethics opinion". 763 S. W. 2d at 128. The Court also stated with the utmost correctness that it "granted review of an advisory opinion, not review of any action taken against Mr. Shapero". *Id.* Such being true, the Court concluded, correctly, that the proceeding before it was not one to which §1988 applies.

2. The Kentucky Supreme Court Correctly Ruled That Petitioner Shapero Is Not Entitled To Recover Attorneys' Fees Under 42 U.S.C. §1988.

Regardless of how one characterizes the Kentucky Supreme Court's decision in *Shapero II,* the Court correctly concluded that Shapero was not entitled to recover attorneys' fees under 42 U.S.C. §1988 in this proceeding. The primary reason why Petitioner is not entitled to recover such fees in this proceeding is because he "failed to mention §1983 in his Brief to [the Kentucky Supreme Court] when [it] reviewed the Board of Governors Advisory Opinion". *Shapero II,* 763 S. W. 2d at 127. His appeal was based solely on the Opinion rendered by the Ethics Committee, and not upon any violation of his civil rights.

The Supreme Court of Kentucky correctly held in *Shapero II* that Petitioner "did not seek anything more than an opinion from us overruling an advisory opinion". 763 S. W. 2d at 128. He did not seek per-

sonal redress. The Court went on to point out that Advisory Opinion E-310 "had no legally binding effect on Shapero before or after we affirmed it", and that "if he had proceeded to mail the letter and disciplinary proceedings had been instituted, and thereafter he had been enjoined or disciplined, then and only then would action have been taken against him". *Id.* The Court stated that the effect of the KBA Advisory Opinion, and of its affirming opinion, "was no more binding on Mr. Shapero than on any other member of the bar". *Id.*

The best test of what one seeks in litigation is the prayer of his pleading. In Shapero's motion for review he asked the Supreme Court of Kentucky to review Advisory Opinion E-310 to determine whether the applicable advertising rule was violative of the First and Fourteenth Amendments in view of the holding in the *Zauderer* case, "and to declare this rule void". Just as this prayer sought no redress of any personal action against Shapero, so too Advisory Opinion E-310 was general in nature and dealt not only with Shapero's inquiry about solicitation letters concerning foreclosures but also with inquiries from others about such letters directed to potential tort plaintiffs. The Supreme Court of Kentucky's ruling in *Shapero I* had no binding effect on Petitioner; therefore, it cannot be said that Petitioner was deprived of any of his civil rights as a consequence of the Court's ruling.

Attorneys' fees are recoverable under 42 U.S.C. §1988 only if one prevails in an action to enforce a

provision of 42 U.S.C. §1983, which creates a civil action against persons who act under color of state law to deprive another of rights secured by the Constitution. Petitioner is not entitled to recover attorneys' fees here because this action is not, and cannot be characterized as, a §1983 action.

Shapero's activities in seeking a ruling of the Ethics Committee and in appealing its ruling to the Supreme Court of Kentucky were, at best, administrative proceedings not necessary to the maintenance by him of his action in Federal Court. In such administrative proceedings, attorneys' fees are not recoverable under §1988. *Webb* v. *Dyer County Board of Education,* 471 U.S. 234, 85 L. Ed. 2d 233, 105 S. Ct. 1923 (1985); *North Carolina Department of Transportation* v. *Crest Street Community Council, Inc.,* 479 U.S. 6, 93 L. Ed. 2d 188, 107 S. Ct. 336 (1986). *Accord Blow* v. *Lascaris,* 523 F. Supp. 913 (N.D.N.Y. 1981), *aff'd* 668 F. 2d 670 (2d Cir. 1982), *cert. denied* 459 U.S. 914, L. Ed. 2d 179, 103 S. Ct. 225 (1982).

Texas State Teachers Assn. v. *Garland Independent School District,* 57 U.S.L.W. 4383 (U.S. Mar. 28, 1989), which Petitioner cites, is not on point. That was an action in which summary judgment was entered in a Federal District Court and was not an administrative proceeding. Moreover, this Court stated that "Where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis,* a district court would be justified in concluding that even the 'generous formulation' we adopt today has not been

satisfied". *Id.* at 4386. The Court pointed out that in the case before it the petitioners "obtained a judgment vindicating the First Amendment rights of public employees in the workplace". *Id.* Shapero has no similar achievement. He has simply obtained the reversal by this Court of the affirmance of an administrative ethics ruling, which was advisory in nature and not binding on him or anyone else.

Petitioner maintains that he obtained declaratory relief (Petition, p. 19), and that such relief entitles him to an award of attorneys' fees under §1988. This claim is simply not true. The ruling of the Kentucky Supreme Court was *not* a declaratory judgment. Likewise, this Court's finding that the Kentucky Supreme Court erred in affirming Advisory Opinion E-310, was not a declaratory judgment. Thus, Petitioner cannot recover his attorneys' fees based upon his claim that he obtained declaratory relief.

3. Petitioner Has A 42 U.S.C. §1983 Action Pending In Federal District Court Which Precludes The Recovery Of Attorneys' Fees In This Proceeding.

The writ sought should be denied because Petitioner Shapero has a 42 U.S.C. §1983 action pending in the Federal District Court for the Western District of Kentucky. See Appendix pp. 1a-8a. In that action, Petitioner raises similar claims to those made in this case and clearly charges that his (and others) civil rights have been abridged by acts of the Respondent, KBA, in prohibiting targeted direct mail solicitation. Specifically, paragraph three of the prayer of the

Amended Complaint in that action seeks a declaration that the adoption and implementation of S.C.R. 3.135 (5)(b)(i) (prohibiting targeted direct mail solicitation by lawyers for pecuniary gain) violates Petitioner's rights under the First, Fifth and Fourteenth Amendments. However, those claims are made in the District Court action, not in this case.

Furthermore, Petitioner Shapero's §1983 action pending in federal district court seeks recovery of attorneys' fees. He cannot recover on the same subject in both his federal court action and this one. The district court action, by its own allegations, is clearly a §1983 action. Such being so, this one cannot be.

A fundamental rule of fairness in Anglo-American jurisprudence is that a plaintiff cannot split his cause of action into various pieces and pursue at his pleasure and according to his own timetable the pieces thereof which suit him best. In *Kendall* v. *Stokes,* 44 U.S. (3 How.) 87, 100, 11 L. Ed. 506, 513 (1845), the Court said:

> The law does not permit a party to be twice harassed for the same cause of action; nor suffer a plaintiff to proceed in one suit to recover the principal sum of money, and then support another to recover damages for the detention.

Again, in *Stark* v. *Starr,* 94 U.S. 477, 485, 24 L. Ed. 276, 278 (1877) this Court held:

> It is undoubtedly a settled principle that a party seeking to enforce a claim, legal or equitable, must

> present to the court, either by the pleadings or proofs or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible.

Cited with approval in *In Re: The Haytian Republic,* 154 U.S. 118, 125, 38 L. Ed. 930, 932-933, 14 S. Ct. 992, 995 (1894).

Petitioner Shapero has pending in federal district court his §1983 action on the same subject of which he here complains. If he is to recover any attorneys' fees, it is in that action, not this one.

CONCLUSION

Petitioner Shapero has played fast and loose with the judicial process: first seeking permission from the Advertising Commission to send his solicitation letter and then abandoning that proceeding when he obtained an adverse ruling; next seeking an advisory ruling about his proposed letter from the Ethics Committee and then treating that ruling as if it had denied permission to him to send the letter (a ruling already made by the Advertising Commission which he did not appeal); then bringing in federal district court what is specifically alleged to be a §1983 action about the same subject and seeking therein attorneys' fees (necessarily under §1988); and now contending that the advisory

ruling proceeding was an enforcement action under §1983 and that he is therefore entitled to attorneys' fees under §1988. Under the ruling of this Court in *Webb v. Dyer County Board of Education,* 471 U.S. 234, 85 L. Ed. 233, 105 S. Ct. 1923 (1985), attorneys' fees incurred in an administrative proceeding not necessary to the maintenance of a §1983 action are not recoverable. So too, the attorneys' fees and expenses incurred by Shapero in this administrative proceeding are not recoverable. The Court should leave Shapero where it finds him and let the District Court dispose of his §1983 case and his request for attorneys' fees in that case.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action
No. 83-0129-L(B)

RICHARD D. SHAPERO - - - - - *Plaintiff*

v.

KENTUCKY BAR ASSOCIATION

AND

SUPREME COURT OF KENTUCKY - - - *Defendants*

AMENDED AND SUPPLEMENTAL VERIFIED COMPLAINT

The Plaintiff, Richard D. Shapero, for his claims against the Defendants, states as follows:

I. INTRODUCTION

1. This is an action pursuant to 28 U.S.C. Section 1343 and 42 U.S.C. Section 1983 brought because of the censorship by Defendants of Plaintiff's legal advertisements in violation of the First, Fifth and Fourteenth Amendment rights of the Plaintiffs.

II. JURISDICTION

2. This Court has jurisdiction under the provisions of 28 U.S.C. Section 1343, in that this is an action brought pursuant to 42 U.S.C. Section 1983.

III. PARTIES

3. Plaintiff, Richard D. Shapero, is a citizen of the United States and an attorney admitted to practice law in the Commonwealth of Kentucky. Shapero has in the past advertised and desires in the future to advertise legal services in the Commonwealth of Kentucky which advertisements require prior approval by the Defendants under Rule 3.135 of the Rules of the Supreme Court of Kentucky (hereafter the "Supreme Court").

4. The Defendant, Kentucky Bar Association (hereafter the "Association") is an entity created pursuant to the laws of the Commonwealth of Kentucky (SCR 3.025) and at all times herein was and is acting under color of and pursuant to that law.

5. The Defendant, Supreme Court of Kentucky, is the highest judicial authority in the Commonwealth of Kentucky and at all times herein was acting under color of and pursuant to state law.

FACTS

6. The Defendants have adopted and caused to be amended various versions of SCR 3.135. See Exhibit A for the most recent version.

7. SCR 3.135 is vague and indefinite, constitutes a prior restraint, has a chilling effect on speech, does not provide due or speedy process for the adjudication of advertising claims and is accordingly violative of the First, Fifth and Fourteenth Amendments to the Constitution of the United States. Specifically, SCR 3.135 is defective facially and as implemented in that:

a. It does not guarantee or provide for cross examination or provide adequate notice of alleged deficiencies in advertisements;

b. It does not provide for speedy relief, speedy appeals, or prompt, effective judicial review;

c. It creates impermissible and unsubstantiated inferences;

d. It impermissibly shifts the burden of proof to the person whose actions are being censored;

e. It imposes a prior restraint;

f. It contains vague, overbroad and/or underdefined terms which chill the exercise of free speech; and

g. It does not provide for a separation of the Bar Association's decision-making functions from its prosecutorial functions.

8. Until March, 1987, SCR 3.135(5)(b)(1) provided that:

> A written advertisement may be sent or delivered to an individual addressee only if that addressee is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time, and only if it is not prompted or precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.

9. In 1985, Plaintiff Shapero sought a determination from the Advertising Commission and, ultimately, from the Kentucky Supreme Court, that SCR 3.135(5)(b)(i) was unconstitutionally vague, overbroad and contrary to the First and Fourteenth Amendments of the United States Constitution. The Advertisng Commission determined that the rule was unconstitutional. See Exhibit B.

10. While the Kentucky Supreme Court agreed and deleted the rule in question, it adopted and applied on an ex post facto basis to Shapero and to all lawyers in Ken-

tucky the following new rule which was effective in March of 1987.

> A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The terms "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

See Exhibit C.

11. This rule is contrary to the holding of the United States Supreme Court in *Zauderer* v. *Office of Disciplinary Counsel,* 471 U.S. ___, 85 L. Ed. 2d 652, 670 (1985), that "an attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding legal rights of potential clients."

12. Prior to 1982, Shapero had obtained the necessary approvals from the Ethics Committee of the Bar Association of certain advertisements which have since been regularly employed in advertising media. These advertisements were subsequently approved again by an agreement entered into in this Court in settlement of certain litigation. See Exhibit D. Pursuant to this Agreement the above identified advertisements were deemed approved by the Association and the Supreme Court.

13. The Agreement also envisioned the adoption of new rules by the Supreme Court which were to guarantee that

once advertisements were approved, they were approved for all time.

14. In 1986 the Supreme Court of Kentucky adopted a new rule, SCR 3.135(5)(b)(ii), which states as follows:

> Any advertisement or mailing authorized and approved by this Commission that lists or suggests areas of an attorney's practice must state in print of equal size and character to the print listing or suggesting the areas of an attorney's practice the following: "This is an advertisement. Kentucky law does not certify specialties of legal practice."

This rule is vague, overbroad, indefinite and constitutionally infirm. This rule was adopted without notice to Shapero or to other members of the Bar.

15. The Defendants have applied the rule referred to in Paragraph 14 so as to require reapproval of all advertising submitted by all advertisers in Kentucky including the advertising referred to in Paragraph 12. Even before the effective date of this adopted rule the Defendants began requiring compliance with the rule. As a result, the Defendants have breached the Agreement referred to in Paragraph 12.

16. The Bar Association has adopted a policy of discriminating against Shapero in the application of its advertising and disciplinary rules and regulations.

17. Without even a hint of an investigation, in 1986 the Bar Association issued a complaint against Shapero based upon his alleged failure to comply with advertising rules. Before filing the Complaint, the Bar Association was aware that the reason the rules were not allegedly complied with with respect to the advertisements in questions was because of an error on the part of the Yellow Pages and not Shapero's own error. Nonetheless the Bar Asso-

ciation initiated a complaint against Shapero. Ultimately, the proceedings were dismissed after Shapero further demonstrated his lack of culpability in the matter and that no rule had been violated.

18. The Bar Association initiated these proceedings against Shapero in violation of his First Amendment rights and because of his high profile as Kentucky's largest advertiser and as one who has been willing to stand up to the First Amendment violations of the Bar Association.

19. On information and belief, the Bar Association has denied equal protection to Shapero by enforcing its advertising rules against him more strictly than it has enforced these rules against other members of the Kentucky Bar.

20. Unless the actions of the Defendants are enjoined, Plaintiff will be irreparably harmed and they have no adequate remedy at law.

CLAIMS

COUNT I

21. Restates the allegations contained in Paragraphs 1 to 20.

22. The actions of the Defendants violated Plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution. As a result this Court ought to enjoin enforcement of SCR 3.135, the operation of the Advertising Commission and, particularly, enforcement of SCR 3.135(5)(b)(1) and SCR 3.135(5)(b)(ii).

COUNT II

23. Restates the allegations contained in Paragraphs 1 to 22.

24. The actions of the Bar Association in discriminatorily enforcing its rules aganst Shapero violated the First,

Fifth and Fourteenth Amendments to the United States Constitution.

25. As a result, Shapero has been damaged in an amount in excess of $20,000.00 in that he has been required to hire attorneys in order to negotiate virtually every aspect of his constitutional right to advertise.

COUNT III

26. Restates the allegations contained in Paragraphs 1 to 25.

27. The actions of the Defendants constitute a restraint of trade and violate 15 U.S.C. Section 1.

COUNT IV

28. Restates the allegations contained in Paragraphs 1 to 27.

29. The actions of the Defendants in retroactively and without advance notice applying its rules to Shapero violated the First, Fifth and Fourteenth Amendments to the United States Constitution and constitute a breach of the Agreement with Shapero.

WHEREFORE, the Plaintiff demands as follows:

1. A restraining order and temporary and permanent injunctions enjoining the Defendants from enforcing SCR 3.135, 3.135(5)(b)(i), and SCR 3.135(5)(b)(ii) and from taking any other action against the Plaintiff which would constitute a restraint with respect to their advertisements;

2. A restraining order and temporary and permanent injunctions enjoining the Defendants from discriminatorily enforcing any rules of the Bar Association;

3. A declaration that the acts of the Defendants in adopting and implementing SCR 3.135(5)(b)(i) and SCR 3.135(5)(b)(ii) violate Plaintiff's rights under the First,

Fifth and Fourteenth Amendments of the Constitution of the United States and under the Agreement with Defendants;

4. A judgment on Shapero's behalf against the Defendants in an amount in excess of $20,000.00; and

5. Their costs herein expended, reasonable attorney's fees and all further relief to which they may be properly entitled.

(s) Donald L. Cox
Donald L. Cox
Mary Janice Lintner
Lynch, Cox & Gilman, P.S.C.
1800 Meidinger Tower
Louisville, Kentucky 40202
(502) 589-4215

I hereby certify that I have read the foregoing Amended and Supplemental Verified Complaint and the statements contained therein are true to the best of my knowledge and belief.

(s) Richard D. Shapero
Richard D. Shapero

Subscribed and sworn to before me by Richard D. Shapero this 26th day of May, 1987.
My commission expires: 5-11-88

(s) Donald L. Cox
Notary Public
Kentucky, State-at-large

[The exhibits referred to have not been reproduced.]

KENTUCKY ATTORNEYS ADVERTISING COMMISSION

IN RE: APPLICATION OF RICHARD SHAPIRO

This matter is before the Commission on a matter that is clearly answered by our Rules, but which presents a difficult question to the Commission under its responsibility to recommend rule changes. SCR 3.135(3)(e)(ii).

The applicant proposes to write a letter to be sent by regular mail to persons against whom real estate foreclosure actions have been filed, advising them of the possibility that a bankruptcy proceeding might help with their problems and informing them of applicant's availability as an attorney handling bankruptcy matters. On the face of it, the letter proposed is in violation of SCR 3.135(5)(b)(i). We have no difficulty finding it is a letter "precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public."

Our problem concerns the validity of that regulation in view of recent holdings of the United States Supreme Court on the subject of attorney advertising. *Zauderer* v. *Office of Disciplinary Council of Supreme Court of Ohio*, ___ U.S. ___, 105 S. Ct. 2265 (1985); *In Re R.M.J.*, 455 U.S. 191 (1982); *In Re Primus*, 436 U.S. 437 (1978); *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447 (1978). We must view this problem in light of our rule which requires prefiling with the Commission of any such written solicitation. RCR 3.135(6).

In sum, the question before us, in considering whether or not to recommend changes, is whether the state can establish interests of sufficient magnitude in this situation to override the public's interest in receiving information on the availability of legal services. In other words, is there danger of deception or overreaching presented by mailings

to persons who because of some specific event may have an unusual need for a lawyer, or an unusual interest in having a lawyer explain to them their legal rights.

The problem is the tension that exists between the right of the state to regulate commercial advertising of the sort involved here and the right of free speech under the First Amendment to the Constitution of the United States. It should be noted that the regulation involved is a restriction on the time, place and manner of speech and it is not a restriction on content. We have no rules which prevents an attorney from placing an advertisement of this type in a medium of general circulation. Such a rule would be improper. *Zauderer* v. *Office of Disciplinary Council of the Supreme Court of Ohio, supra.* The state is free to fashion reasonable restrictions with respect to the time, place and manner of solicitation by the members of its bar. *In Re Primus, supra.* The state does have a recognized interest in regulating members whose profession it licenses, and who serve as officers of its courts. These special interests amply justify the application of narrowly drawn rules to proscribe solicitation that is in fact misleading, overbearing or involves other features of deception or improper influence. A state may forbid in-person solicitation for pecuniary gain under circumstances likely to result in those evils. *Ohralik* v. *Ohio State Bar Association, supra.*

The question to be answered is whether our rule restricting direct mail solicitation is drawn sufficiently narrow to prevent only those circumstances likely to result in misleading, overbearing, deception or improper influence, or whether the state interest could be satisfied by other, less restrictive means.

In *Ohralik* the Supreme Court ruled that the in-person solicitation of business by a lawyer was so fraught with potential for wrongdoing and so difficult to police that it justified the establishment of prophylactic measures pre-

venting it. The courts recognized the difference between the protection of commercial free speech which occurs in an area traditionally subject to governmental regulation, and other varieties of speech where the same type of regulation might be impermissible.

In *Ohralik* the Court specifically found that the free speech element is an essential but subordinate component of a situation of in-person solicitation by a lawyer of a prospective client. Unlike a public advertisement which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demand an immediate response without providing an opportunity for comparison or reflection. Under those circumstances, there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities or persons close to the solicited individual. Such situations are inherently conducive to overreaching and other forms of misconduct. The potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured or distressed lay person. Under such circumstances, the Court held, it is not unreasonable for the state to presume that an in-person solicitation by lawyers more often than not will be injurious to the person solicited.

Our situation here is somewhat different. The question we have before us is whether it is unreasonable for the state to presume, by the present regulations, that the direct mail solicitation by lawyers will more often than not be injurious to the person solicited. If we cannot make that presumption then we have little basis to justify our regulation. This is particularly true in view of our regulations which require pre-filing of such solicitations, so that the Commission has the opportunity to view these solicitations before they are received by the addressee.

The most recent case from the Supreme Court, *Zauderer*, does not specifically answer our question, but has language which suggests that our present regulation cannot be justified. That case makes it clear that while the state is free to prevent dissemination of commercial speech that is false, deceptive or misleading, where such activities are not involved speech may be restricted only as a result of substantial governmental interests through means that directly advance that interest. Blanket bans are impermissible, but rules prohibiting in-person solicitation are under some circumstances permissible. That case went on to point out the difference between face-to-face solicitation and print advertising generally, which poses much less risk of overreaching or undue influence.

While the *Zauderer* decision does seem to be based on the recognition that Ohio was regulating the content of the advertisement involved, not necessarily the time, place or method chosen for the solicitation, it is still evident from that decision that a written letter is quite different from a personal encounter and does not bear the same possibilities for overreaching, invasion of privacy, exercise of undue influence and outright fraud that justifies the proscription on in-person solicitation. *Zauderer* emphasizes that restrictions involving commercial speech that is not deceptive must be narrowly crafted to serve the state's purposes.

We must analyze the basis for preventing the direct mail solicitation here involved. Under our regulations we will be able to review the content of such solicitation because of our pre-filing requirements. Certainly, it is not improper for an attorney to advertise generally that he is able to represent individuals who have a specific problem or who have suffered as a result of a specific set of circumstances. Can it be wrong to direct this advertising specifically to those he is able to identify as being in a particular position most likely to benefit from legal serv-

ices? Unless we can say that the sort of direct mail solicitation involved here creates a serious risk of overreaching, exercise of undue influence or fraud, we cannot justify a blanket prohibition. It is not sufficient justification to limit advertising because it had a tendency or did in fact encourage the filing of lawsuits. The bottom line in *Zauderer* is this:

> An attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and non-deceptive information and advice regarding legal rights of potential clients.

105 S.Ct. at 2280.

In summary, we believe the regulation involved should be amended by the Kentucky Supreme Court in view of decisions discussed herein because of its impact on the First Amendment to the Constitution and the free speech provisions contained therein. However, until such amendment we have no choice but to disapprove the proposed advertisement as it does violate existing rules. We therefore find as follows:

1. The proposed advertisement of the Applicant is in violation of SCR 3.135(5) and it is not approved;

2. We recommend that the Advertising Rules be amended so that SCR 3.135(5)(b)(i) is deleted.

Dated this ____ day of September, 1985.

(s) Lindsey Ingram
Lindsey W. Ingram, Jr. Chairman
Attorneys Advertising Commission

ADVISORY OPINIONS
E-310

QUESTION: May an attorney write a letter and send it by regular mail to a specific individual that the lawyer has identified as being in need of the attorney's legal services?

ANSWER: NO.

OPINION

Several requests for advisory opinions have been forwarded to the Attorneys Advertising Commission and the Ethics Committee seeking approval of "targeted direct-mail advertising" to potential tort plaintiffs, victims of foreclosures, etc. Such target individuals can be readily identified in a perusal of the daily newspapers.

In response, the Attorneys Advertising Commission issued an opinion denying one of these requests under the authority of SCR 3.135(5)(b)(i), which provides:

> (b)(i) A written advertisement may be sent or delivered to an individual addressee only if that addressee is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time, and only if it is not prompted or precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.

When this rule is read alongside the definition of "advertising" contained in SCR 3.135(2), it is clear that the rule classifies as prohibited "solicitation" mailed communications to individuals known to have specific legal problems. The Commission applied the rule as written, despite arguments relating to the validity of the rule after *Zauderer* v. *Office of Disciplinary Council*, __ U.S. __, 105 S. Ct. 2265 (1985).

The Code of Professional Responsibility also prohibits this sort of client recruitment. DR 2-104(A) and SCR 3.130.

The Special Committee on the Model Rules of Professional Conduct is in the process of reviewing, amending and presenting new standards to replace the Code. Model Rules 7.1 and 7.2, like SCR 3.135, permit truthful, non-misleading advertising. However, the ABA version of Model Rule 7.3 still prohibits "solicitation" for "pecuniary gain". The rule provides in pertinent part:

> The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

Consequently, the latest word from the ABA is consistent with SCR 3.135. In addition, it is possible to reconcile these standards with *Kentucky Bar Association* v. *Stuart*, 568 S.W.2d 933 (1979), which "approved" an attorney's mailings to commercial businesses, which were not inspired by a particular event.